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In The

Supreme Court of the United States

October Term, 1996

CITY OF DALLAS, TEXAS, WILLARD ROLLINS, RICHARD HATLER,

Petitioners,

vs.

RICHARD KIRKS and JAN FORSYTH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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15 pp

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 2

I. RESPONDENTS SUFFERED NO ADVERSE EMPLOYMENT ACTION AS A MATTER OF LAW 2

II. PETITIONERS ROLLINS AND HATLER ARE ENTITLED TO QUALIFIED IMMUNITY 3

A. PETITIONERS HAVE PROPERLY BROUGHT THE ISSUE OF QUALIFIED IMMUNITY BEFORE THIS COURT ... 4

B. THE JURY NEVER CONSIDERED NOR CONCLUDED THAT PETITIONERS KNOWINGLY VIOLATED THE LAW, OR ANY OTHER FACTUAL ISSUES, REGARDING QUALIFIED IMMUNITY .. 5

C. TRIABLE ISSUES OF FACT REGARDING QUALIFIED IMMUNITY SHOULD HAVE BEEN PRESENTED TO THE JURY 6

III. THE *PICKERING* BALANCE DOES NOT REQUIRE A SHOWING OF ACTUAL DISRUPTION IN THE WORKPLACE, BUT ONLY A SHOWING OF A POTENTIAL DISRUPTION OF OR LIKELY INTERFERENCE WITH THE EFFICIENCY OF THE WORKPLACE BEFORE THE EMPLOYER MAY TAKE EMPLOYMENT ACTION 6

TABLE OF CONTENTS – Continued

Page(s)

IV. A SPEAKER'S MOTIVATION OR INTEREST IN "SPEAKING OUT" IS A DETERMINATIVE FACTOR IN DECIDING WHETHER THE SPEECH ADDRESSES A MATTER OF PUBLIC CONCERN 7

V. THE AWARD OF PUNITIVE DAMAGES IS IMPROPER IN THIS CASE 7

VI. THE FIFTH CIRCUIT IMPROPERLY FOUND LIABILITY UNDER THE TEXAS WHISTLEBLOWER ACT 8

VII. THE FIFTH CIRCUIT'S FAILURE TO ADDRESS THE CITY'S LIABILITY UNDER 42 U.S.C. §1983 RESULTED IN AN IMPROPER FINDING OF LIABILITY 8

VIII. PETITIONERS TIMELY FILED THE PETITION FOR WRIT OF CERTIORARI 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

A. CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 3, 4

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 6

Board of County Commissioners v. Umbehr, 518 U.S. ___, 135 L.Ed.2d 843 (1996) 6

Carey v. Piphus, 435 U.S. 247 (1978) 7

City of Beaumont v. Bouillion, 896 S.W.2d 143 (Tex. 1995) 8

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 7

Connick v. Myers, 461 U.S. 138 (1983) 7

Cygnar v. City of Chicago, 865 F.2d 827 (7th Cir. 1989) 5

First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253 (1968) 6

Forsyth v. City of Dallas, 91 F.3d 769 (5th Cir. 1996) 2

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 4, 5

Hunter v. Bryant, 502 U.S. 224 (1991) 4

Kelley v. Johnson, 425 U.S. 238 (1976) 7

Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 5

Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) 7

Mitchell v. Forsyth, 472 U.S. 511 (1985) 4, 5

Pierce v. Texas Dep't of Criminal Justice, Institutional Div., 37 F.3d 1146 (5th Cir. 1994) 2

TABLE OF AUTHORITIES – Continued

Page(s)

Procunier v. Navarette, 434 U.S. 555 (1978) 4

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 3

Siegert v. Gilley, 500 U.S. 226 (1991) 4, 5

Smith v. Wade, 461 U.S. 30 (1983) 7

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 8

United States v. National Treasury Employees Union, 513 U.S. ___, 130 L.Ed.2d 964 (1995) 6

Walsh v. Ward, 991 F.2d 1334 (7th Cir. 1993) 3

Waters v. Churchill, 511 U.S. 661, 128 L.Ed.2d 686 (1994) 7

B. CONSTITUTION

First Amendment ..... *passim*

C. STATUTES

28 U.S.C. §1254 8

28 U.S.C. §1331 8

28 U.S.C. §1441 8

42 U.S.C. §1983 ..... *passim*

SUP. CT. R. 13.1 9

SUP. CT. R. 13.3 9

SUP. CT. R. 15.2 ..... 2, 7

Texas Whistleblower Act ..... *passim*

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners City of Dallas, Texas, Willard Rollins, and Richard Hatler ("Petitioners" or "the City," "Rollins" and "Hatler") file this Reply to Respondents' Brief in Opposition to Petitioners' Petition for Writ of Certiorari. In support thereof, Petitioners respectfully show the Court as follows:

INTRODUCTION

Respondents' Brief is replete with challenges to the Petition for Writ of Certiorari asserting that the Petition is misleading in fact and law. These assertions are simply incorrect. This Court should not be misled because Respondents conspicuously have failed to support their assertions in law with citations to proper legal authority, or in fact with references to the record. The points of law which Petitioners brought before this Court remain basically unchallenged on any valid legal ground in Respondents' Brief in Opposition. Given the full disclosure of the facts in the Appendix and in the Petition, it is impossible to mislead this august Court. Finally, Respondents' blatant attempt to misrepresent the facts and the law underscores the importance of the issues presented and the necessity for this Court to grant certiorari and review the injustices dealt Petitioners in the courts below.

STATEMENT OF THE CASE

Respondents' Brief in Opposition conclusorily claims that Petitioners' statement of facts materially misrepresents the evidence, but **Respondents fail to state how the misrepresentation is made or which facts misrepresent the evidence.** Respondents' additions to the statement of facts do not bear materially on the issues before the Court

if certiorari is granted. SUP. CT. R. 15.2. Respondents' statement of the facts is not materially different from Petitioners' statement of the facts, except that portions of Respondents' facts are argument rather than fact.

REASONS FOR GRANTING THE WRIT

I. RESPONDENTS SUFFERED NO ADVERSE EMPLOYMENT ACTION AS A MATTER OF LAW.

Respondents misrepresent Petitioners' argument regarding adverse employment actions. The jury found the transfers were adverse employment actions, **but the jury made no finding that the transfers were demotions.** The lateral transfer from the day shift in the Intelligence Division to the night shift in the Patrol Division with genuine responsibilities and duties in the new position and with no reduction in salary, rank, grade, benefits, or loss of promotional opportunities, does not constitute an adverse employment action as a matter of law because it was not a discharge, demotion, refusal to hire, refusal to promote or reprimand. *See Pierce v. Texas Dep't of Criminal Justice, Institutional Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994); App. W, p. 128.

Respondents' reference to popular culture and televised police shows is irrelevant and insufficient as a matter of law to overcome the issue that the lateral transfers in this case do not constitute adverse employment actions under the First Amendment. The Fifth Circuit held that the lateral transfers were demotions because of Respondents' **perception** that the new positions were less prestigious and interesting, although the court conceded that a plaintiff's subjective perception is not enough to prove a demotion. *Forsyth v. City of Dallas*, 91 F.3d 769, 774 (5th Cir. 1996). This holding creates a cause of action not recognized by existing Supreme Court precedent for any public employee who wants to challenge a lateral transfer to a position with no loss in pay, rank, grade, benefits or promotional opportunities and with genuine

responsibilities and duties. *See, e.g., Walsh v. Ward,* 991 F.2d 1334, 1346 (7th Cir. 1993).

The law was not clearly established in 1989 that lateral transfers such as the ones in this case constituted adverse employment actions. Petition, pp. 6-8. This Court ruled for the first time that transfers were actionable under the First Amendment in 1990, when the Court dealt with transfers which had an economic impact on the one transferred, not with subjective beliefs regarding job assignments. *See Rutan v. Republican Party of Illinois,* 497 U.S. 62, 73-74 (1990). **However, as a matter of law, no adverse economic impact on Respondents was established.** Respondents make the broad assertion that Petitioners mislead the Court by stating that a conflict does not exist regarding whether a lateral transfer such as in this case constitutes an adverse employment action under the First Amendment, but **never distinguish or analyze the cases** presented by Petitioners. Petitioners clearly articulate how the conflict exists by showing the Court the cases which hold that a lateral transfer is actionable, and those cases which hold that it is not. Respondents have made no logical, legitimate or coherent response to Petitioners' contention that this Court should resolve this clear conflict in the circuits.

II. PETITIONERS ROLLINS AND HATLER ARE ENTITLED TO QUALIFIED IMMUNITY.

Respondents misrepresent Petitioners' argument regarding qualified immunity by stating it in generalized terms. Respondents' argument that "the law was clearly established in 1989 that retaliation and adverse employment action against a public employee for protected speech was unlawful" is precisely the **global** and **generalized** statement of the law which this Court has specifically found to be insufficient as a matter of law to deny a public official his entitlement to qualified immunity. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). Rollins and Hatler testified that they knew they could not retaliate

under the First Amendment but likewise testified that they did not know that the lateral transfers in this case were impermissible under the law.

Respondents' argument is clearly erroneous that the Court should look to a "criminal equivalent to §1983" when ascertaining whether the law is clearly established. This Court has ample precedent wherein §1983 plaintiffs may not simply rely on a general statement of law to prove that the law was clearly established and to determine whether defendants' conduct met the objective legal reasonableness test. *Anderson*, 483 U.S. at 639; Petition, pp. 8-17. The courts must ask whether the official acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed years after the fact. *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). An official could not reasonably have been expected to be aware of a constitutional right that had not yet been declared. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). In their Brief in Opposition, Respondents have cited no case which refutes these well established principles of law. Rollins and Hatler were also entitled to qualified immunity where a conflict among the circuits exists regarding whether a lateral transfer such as in this case is an adverse employment action under the First Amendment.

A. PETITIONERS HAVE PROPERLY BROUGHT THE ISSUE OF QUALIFIED IMMUNITY BEFORE THIS COURT.

Respondents' argument that Petitioners waived the qualified immunity defense by not raising it prior to trial is preposterous, is contradictory to this Court's rulings, and raises an issue sufficient for this Court to grant certiorari. Qualified immunity is an entitlement from suit and other burdens of litigation as well as from civil damages. *See Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Harlow v.*

Fitzgerald, 457 U.S. 800, 818 (1982). The qualified immunity defense protects the defendant from different and distinct burdens. *Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). Because qualified immunity protects the defendant from the burdens of pretrial discovery, trial and liability, this defense can be raised at various stages of litigation, including at the pleading stage in a motion to dismiss, after discovery in a motion for summary judgment, or as an affirmative defense at trial. *Kennedy*, 797 F.2d at 300. Where a defendant fails to raise the issue of qualified immunity in a summary judgment motion, the defendant has not waived the right to raise the issue later in a motion for judgment notwithstanding the verdict or in an appeal. *Cygnar v. City of Chicago*, 865 F.2d 827, 842-43 n.16 (7th Cir. 1989). Thus, while Petitioners may have waived their immunity from suit, they have not waived their entitlement to immunity from liability for civil damages. To hold that Petitioners have waived their qualified immunity would frustrate the very purposes set forth in *Siegert, Mitchell* and *Harlow*. Petitioners have raised important federal issues regarding qualified immunity which Respondents have failed to overcome in their Brief in Opposition, and this Court should grant certiorari.

B. THE JURY NEVER CONSIDERED NOR CONCLUDED THAT PETITIONERS KNOWINGLY VIOLATED THE LAW, OR ANY OTHER FACTUAL ISSUES, REGARDING QUALIFIED IMMUNITY.

Respondents' allegation that "the jury decided that Rollins and Hatler 'knowingly' violated the law" is disingenuous. The exact reason why this Court should grant certiorari is that the jury **failed to consider factual issues** regarding qualified immunity which resulted in manifest injustice to Rollins and Hatler.

C. TRIABLE ISSUES OF FACT REGARDING QUALIFIED IMMUNITY SHOULD HAVE BEEN PRESENTED TO THE JURY.

Contrary to Respondents' assertions, the jury never had the opportunity to consider triable issues of fact regarding qualified immunity, nor did the jury find that Petitioners' order to transfer Respondents to patrol was an act of retaliation. App. W. The Fifth Circuit's failure to address the district court's refusal to submit a jury instruction and issue on qualified immunity is contradictory to opinions of this Court and of other circuits because fact issues for a jury existed to determine whether Rollins and Hatler were entitled to qualified immunity. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (*quoting First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)).

III. THE *PICKERING* BALANCE DOES NOT REQUIRE A SHOWING OF ACTUAL DISRUPTION IN THE WORKPLACE, BUT ONLY A SHOWING OF A POTENTIAL DISRUPTION OF OR LIKELY INTERFERENCE WITH THE EFFICIENCY OF THE WORKPLACE BEFORE THE EMPLOYER MAY TAKE EMPLOYMENT ACTION.

Respondents' argument that the Fifth Circuit was correct in finding that the employer cannot take action prior to manifesting a disruption in the workplace on the basis that "[n]o defense witness testified that Forsyth and Kirk's publication of the wiretapping allegations undermined the DPD's operations" is contradictory to this Court's precedent. This Court has consistently held that reasonable predictions of disruption are sufficient to justify restrictions on employee speech. *See Board of County Commissioners v. Umbehr*, 518 U.S. ___, 135 L.Ed.2d 843, 852 (1996); *United States v. National Treasury Employees Union*, 513 U.S. ___, 130 L.Ed.2d 964, 985 n.21 (1995);

Waters v. Churchill, 511 U.S. 661, 128 L.Ed.2d 686, 698-99 (1994); *Connick v. Myers*, 461 U.S. 138, 152 (1983); and *Kelley v. Johnson*, 425 U.S. 238 (1976); Petition, pp. 20-22.

IV. A SPEAKER'S MOTIVATION OR INTEREST IN "SPEAKING OUT" IS A DETERMINATIVE FACTOR IN DECIDING WHETHER THE SPEECH ADDRESSES A MATTER OF PUBLIC CONCERN.

Respondents have not raised any points in opposition to Petitioners' argument that their speech was not a matter of public concern.

> Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

SUP. CT. R. 15.2. Respondents failed to preserve their First Amendment claim by not addressing this issue in their Brief in Opposition.

V. THE AWARD OF PUNITIVE DAMAGES IS IMPROPER IN THIS CASE.

Punitive damages should be awarded only where there is the requisite showing of malicious intent. *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 306 n.9 (1986); *Smith v. Wade*, 461 U.S. 30, 56 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981); *Carey v. Piphus*, 435 U.S. 247 (1978). The jury question for punitive damages was based on the liability found under jury question numbers 2 and 3, and not whether the jury found malice or reckless or callous disregard of Respondents' rights by Petitioners. App. W. pp. 137-38, 147-48; Petition, pp. 24-26.

VI. THE FIFTH CIRCUIT IMPROPERLY FOUND LIABILITY UNDER THE TEXAS WHISTLEBLOWER ACT ("THE ACT").

This Court can review the Fifth Circuit's opinion regarding Respondents' claims under the Act, since the district court assumed supplemental jurisdiction over these claims which arose out of a common nucleus of operative facts, and the Fifth Circuit issued judgment regarding these claims. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); 28 U.S.C. §§ 1331, 1441, 1254.

As a matter of law, transfers were not actionable as adverse employment actions under the Texas Whistleblower Act in 1989. The Fifth Circuit's reliance on the news report to *The Dallas Morning News* for a finding of liability of the City of Dallas under the Texas Whistleblower Act is in direct contradiction to Texas Supreme Court law. "The media is not an appropriate 'law enforcement authority' under the Whistleblower Act." *See City of Beaumont v. Bouillion*, 896 S.W.2d 143, 145 (Tex. 1995). Since Respondents did not show the requisite causal connection between an alleged report and an alleged adverse employment action, a necessary element of their whistleblower claim is missing, and no liability was established; thus, the award of $750,000 in punitive damages against the City under the Act is without legal basis. Petition, pp. 26-29.

VII. THE FIFTH CIRCUIT'S FAILURE TO ADDRESS THE CITY'S LIABILITY UNDER 42 U.S.C. § 1983 RESULTED IN AN IMPROPER FINDING OF LIABILITY.

Respondents again materially misrepresent the district court's judgment by saying the City was not held monetarily liable under 42 U.S.C. § 1983. The district court's judgment specifically provided that Respondents could recover damages for claims brought pursuant to § 1983. App. E, pp. 20-22. The Fifth Circuit's failure to

review the City's liability under § 1983, coupled with its improper finding of liability of the City under the Texas Whistleblower Act, results in a gross miscarriage of justice. Petition, pp. 22-23.

VIII. PETITIONERS TIMELY FILED THE PETITION FOR WRIT OF CERTIORARI.

On August 16, 1996, the Fifth Circuit affirmed the district court's amended judgment, and Petitioners timely filed their Petition for Rehearing and Suggestion for Rehearing En Banc. App. A, L. The Fifth Circuit ordered on November 15, 1996, that the supplemental motion of Respondents to amend the August 16, 1996 judgment be granted to the extent necessary to remand the issue of attorneys' fees, but did not rule on Petitioners' Petition for Rehearing or Suggestion for Rehearing En Banc at that time. App. D. On March 6, 1997, the Fifth Circuit issued mandate with no prior ruling in the record on Petitioners' Petition for Rehearing. App. K. Petitioners filed a motion to recall the mandate on the basis that the Fifth Circuit had never ruled on the Petition for Rehearing, and the issuance of the mandate was untimely. The Fifth Circuit granted the motion to recall the mandate, and, on March 31, 1997, issued (1) an amended judgment affirming the district court's judgment and (2) an order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc, said order also being issued as and for the mandate. App. B, C.

A petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a United States court of appeals "is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment." SUP. CT. R. 13.1. If, however, a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties runs from the date of the denial of the petition for rehearing. SUP. CT. R. 13.3. The Fifth Circuit's order denying the Petition for Rehearing on March 31, 1997 and

judgment on the same date necessarily establish the date from which time begins to run for the filing of the petition for writ of certiorari. Thus, the time period within which Petitioners may file a petition for writ of certiorari runs from the date of the denial of rehearing and entry of the judgment by the Fifth Circuit, March 31, 1997, through the 90th day from the entry of the judgment, June 29, 1997. Since June 29, 1997 falls on a Sunday, Petitioners had until June 30, 1997 to file their Petition for Writ of Certiorari to this Court.

CONCLUSION

For the reasons stated herein, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, to review and reverse the opinion of the Fifth Circuit and render judgment in favor of Petitioners in all respects and on all issues, and, alternatively, to review and remand this case for a new trial for the reasons stated herein, and for such other and further relief, at law and in equity, to which Petitioners show themselves justly entitled.

Respectfully submitted,

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